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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATION COMMISSION
Washington, DC 20554

In the Matter of)
)
Tohono O'odham Utility Authority) AAD-
)
Petition for Waiver of)
Section 54.403(a) of the)
Commission's Rules)

CC: 96-45

TO: Chief, Accounting Policy Division
Common Carrier Bureau

PETITION FOR WAIVER

Tohono O'odham Utility Authority ("Tohono O'odham")¹ by its attorneys and pursuant to Section 1.3 of the Commission's Rules, seeks waiver of Section 54.403(a) of the Commission's Rules to eliminate the prerequisite of state commission action, enabling Tohono O'odham to receive an additional \$3.50 in federal Lifeline support per Lifeline subscriber. Grant of the requested waiver will promote the policies underlying the Commission's Lifeline rules and, accordingly, serve the public interest.

¹ Tohono O'odham is a local exchange company ("LEC"), holding a certificate of public convenience and necessity issued by its tribal Authority. Tohono O'odham is a "rural telephone company" under the Telecommunications Act of 1996 ("1996 Act"). Pursuant to Section 214(e)(6) of the Communications Act of 1934, as amended (the "Act"), Tohono O'odham was designated an Eligible Telecommunications Carriers ("ETC") by the Commission. See Designation of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Apache Telecommunications Utility, Inc., and Tohono O'odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, *Memorandum Opinion and Order*, DA 98-392 (rel. February 27, 1998) ("Designation").

I. Introduction

Tohono O'odham is a certified ETC, providing basic telecommunications services to Native Americans residing on tribal lands located in Arizona. Tohono O'odham currently receives universal support and Lifeline support.² Tohono O'odham is subject to the jurisdiction of the governing body of a distinct federally-recognized Indian tribe, which regulates the provision of telecommunications services within tribal lands; the Arizona Corporation Commission ("ACC") does not assert jurisdiction over Tohono O'odham.³

Section 54.403(a) of the Commission's Rules requires state commission action and state matching support before additional federal Lifeline support of \$3.50 per Lifeline subscriber is made available to ETCs. Tohono O'odham, however, is subject only to regulation by its tribal authority, which is not a "state commission."⁴ Application of Section 54.403(a) therefore precludes Tohono O'odham from eligibility for additional federal support. As demonstrated below, this result is contrary to the underlying purposes of the Lifeline support program. Accordingly, it is in the public interest for the Commission to waive the "state action" requirements.

² *Designation*, DA 98-392 at ¶ 19.

³ *Id.*

⁴ See 47 U.S.C. §§ 153(40) & (41); see also AB Fillins Petition for a Declaratory Ruling Preempting the Authority of the Tohono O'odham Legislative Council to Regulate the Entry of Commercial Mobile Radio Service to the Sells Reservation Within the Tucson MSA, Market No. 77, *Memorandum Opinion and Order*, 12 FCC Rcd 11755 (1997)(*AB Fillins Order*)(finding that tribal authorities are not states); *Designation*, DA 98-392 at ¶ 4 (concluding that Tohono O'odham is not subject to the jurisdiction of a state commission).

II. Section 54.403(a)'s State Action Requirements Should Be Waived to Provide the Maximum Support to Tohono O'odham's Historically Under-Served Areas.

A. Waiver is Required Because The Rules Do Not Address the Situation of Tribal Rural Telephone Companies.

Pursuant to Section 54.405 of the Commission's Rules, Tohono O'odham, as an ETC, offers Lifeline service to qualifying low-income users and, pursuant to Sections 54.403(a) and 54.407, receives the initial \$3.50 of federal support for each Lifeline subscriber.⁵ However, under the Rules, Tohono O'odham is ineligible for the additional federal support of up to \$3.50 per Lifeline subscriber because Tohono O'odham is not subject to the jurisdiction of the ACC, and thus is not subject to the requisite "state action." Specifically, Tohono O'odham does not receive the \$1.75 additional federal Lifeline support because the state has no authority to approve the \$1.75 reduction in the portion of the intrastate rate paid by the Lifeline subscriber.⁶ In addition, the state has not contributed any Lifeline support, so additional federal matching funds are not available under the Rules.⁷

The Commission has recognized that Indian reservations and tribal governments do not come within the definition of the term "state"⁸ and that the LECs such as Tohono O'odham are not subject to the jurisdiction of a state commission.⁹ Because the distinct circumstances of

⁵ The initial \$3.50 is currently provided in the form of a Subscriber Line Charge ("SLC") waiver. *See* Federal-State Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776, 8962 (rel. May 8, 1997) ("*Universal Service Order*").

⁶ *See Universal Service Order*, 12 FCC Rcd at 8963.

⁷ 47 C.F.R. § 54.403(a).

⁸ *See AB Fillins Order*, 12 FCC Rcd at 11761.

⁹ *Designation*, DA 98-392 at ¶ 4.

tribal rural telephone companies are not addressed, the combined effect of the Commission's Rules is to create an artificial barrier to Tohono O'odham's access to the funding intended to benefit low-income subscribers.

B. Waiver of the State Action Requirements of Section 54.403(a) to Enable Tohono O'odham's receipt of the Additional Federal Support of \$3.50 Per Lifeline Subscriber is in the Public Interest and Should be Granted.

Because Native American communities have the lowest subscribership and highest poverty ratios in the Nation, waiver of Section 54.403(a) would be consistent with the public interest¹⁰ and advance the goals of the 1996 Act. Although Tohono O'odham has made substantial progress toward fulfilling its fundamental purpose of providing initial telephone service to substantial portions of tribal lands, many potential subscribers who qualify for Lifeline service are still¹¹ unable to afford telephone service at available support levels.

Tohono O'odham's subscribership levels for basic telephone service is significantly below the national average.¹² While Tohono O'odham has substantially improved the subscribership

¹⁰ Waiver of a Commission rule is appropriate if (1) the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and grant of the waiver is otherwise in the public interest, or (2) unique facts or circumstances render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, and there is no reasonable alternative. *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

¹¹ Tohono O'odham estimates that 635 residential households that qualify for Lifeline service do not currently have telephone service.

¹² On the Tohono O'odham reservation, only 70% of the households have telephone service. See Federal-State Joint Board on Universal Service, *Recommended Decision*, 12 FCC Rcd 87, 299-300 (1996) ("Recommended Decision") (telephone subscribership rate is almost 94 percent in the United States; current subscribership rates are only 87.1 percent among households with incomes less than \$10,000 and only 75 percent among households with annual incomes less than \$5,000.00).

ratios on its reservation since the commencement of service, it recognizes that the current numbers are too low and desires to take all possible measures to achieve subscribership levels comparable to the rest of the country. The availability of additional subscriber support will make the telephone service more affordable for the many eligible, but unserved, residents of tribal lands, thus furthering universal service goals.¹³

The Commission has emphasized that the "[a]ffordability of basic telephone service is necessary to ensure that low income consumers have access not only to intrastate services but to interstate telecommunications as well."¹⁴ With respect to Lifeline programs, the Commission has acknowledged that the Act reveals a renewed concern for the needs of low-income citizens.¹⁵ Congress has expressed the "principle that rates should be 'affordable,' and that access should be provided to 'low-income consumers' in all regions of the nation."¹⁶

The initial \$3.50 of federal Lifeline support per low-income consumer has not proved to be a sufficient financial incentive to foster the level of demand for Lifeline service which should be generated in the Tohono O'odham serving area. To increase the demand for Lifeline service, Tohono O'odham seeks to lower Lifeline rates by an additional \$3.50, but requires access to the additional federal Lifeline support of \$3.50 to accomplish this goal without jeopardizing economical and efficient service to its other Native American subscribers.

Accordingly, Tohono O'odham requests waiver of the requirement that state matching

¹³ See *supra* note 11.

¹⁴ *Universal Service Order*, 12 FCC Rcd at 8962.

¹⁵ *Id.*

¹⁶ *Id.*

support be provided. There is no mechanism by which Tohono O'odham can participate in the Arizona support plan, nor is it feasible for its tribal government to develop a support plan because Tohono O'odham does not have a sufficient pool of customers or residents, with the mix of Lifeline and non-Lifeline customers which might be found in an entire state, to recover equitably the funds needed to fulfill the matching fund requirement. Accordingly, the public interest is best served by waiving this requirement altogether in this circumstance. The underlying policy goal of Section 54.403(a), the reduction in subscriber charges, will be effected by the tribal authority upon grant of the requested waiver. Insofar as Section 54.403(a) requires "state commission" approval of such reduction, waiver of the provision is also requested.

Grant of the waiver request will enable Tohono O'odham to make Lifeline services more attractive and thereby positively affect the low subscribership level among the substantial populations of low income consumers on the reservation.¹⁷ The Commission has emphasized that the public interest is served by such an outcome.¹⁸ Absent Commission waiver of the state requirements of Section 54.403(a), the national public policy goals to increase subscribership by reducing charges to low-income users,¹⁹ especially Native Americans, will be thwarted.

IV. Conclusion

For the reasons stated herein, Tohono O'odham respectfully requests that the Commission

¹⁷ See *Universal Service Order*, 12 FCC Rcd at 8963 ¶352 & 8965 ¶358. See also *Recommended Decision*, 12 FCC Rcd at 299-300.


¹⁸ Commissioner Gloria Tristani, Remarks to National American Indian Telecommunications Workshop (July 30, 1998).

¹⁹ See *Universal Service Order*, 12 FCC Rcd at 8952-53.

expeditiously review and grant the requested waiver needed to receive the additional \$3.50 in federal Lifeline support. The facts clearly demonstrate that strict compliance with the current federal Lifeline support rule is inconsistent with the public interest, and, accordingly, the public interest will be served by granting this waiver request.

Respectfully submitted,

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January 26, 1999

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CERTIFICATE OF SERVICE

I, Shelley Bryce, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing was served on this 26th day of January 1999, by first class, U.S. Mail, postage prepaid to the following parties:


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